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OCTOBER TERM, 1958

No. ———

UNITED STATES OF AMERICA, PETITIONER

v.

DURHAM LUMBER COMPANY, A CORPORATION, AND GEORGE H. CARTER, JR., FORMERLY TRADING AS DIXIE CONCRETE AND SUPPLY COMPANY

PETITION FOR A WRIT OF CRETIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF

QUESTION PRESENTED

Whether Federal Tax Lien enlarges the property rights or rights to property of a defaulting taxpayer, thereby extinguishing private rights and liabilities as between persons who do not claim by or through or in place of the defaulting taxpayer.

STATUTES INVOLVED

Sections 6321, 6322, 6323 of the Internal Revenue Code of 1954, and Sections 44-1, 44-6, 44-8, 44-9, 44-10, 44-11 of the General Statutes of North Carolina (Recompiled 1950) are set

forth in Appendix B, Petitioner's Brief, pp. 38-43; and Section 44-12 of the General Statutes of North Carolina (Recompiled 1950) as set forth in Appendix A, **infra., p. 6.**

REASONS FOR NOT GRANTING THE WRIT

The District Court and the Circuit Court were correct in holding that the funds involved were the property of the Respondents and that said funds were not the assets of the bankrupt contractor, the defaulting taxpayer. Under the laws of the State of North Carolina, contained in General Statutes, Sections 44-1, 44-6, 44-8, 44-9, 44-10, 44-11, (Appendix B, pp. 38-43, Petitioner's Brief), and 44-12 (Appendix A, **infra**, p. 6.), the unpaid monies in the hands of the owners were the property of the materialmen at all times until paid to the contractor.

It is clear, under the decisions of this Court, that legal interests and rights are created by state law, and that the Federal Revenue Acts designate what interests and rights shall be taxed. That Section 6321 of the Internal Revenue Code of 1954 (Appendix B, p. 38, Petitioner's Brief) imposes a tax lien on all property and rights to property belonging to the taxpayer. It is also clear from the decisions of this Court that the Internal Revenue Code does not create property interests or the rights to property, but that remains a matter for state law. **Morgan v. Commissioners,** 309 U. S. 78, 60 S. Ct.

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424, 84 L. Ed. 585; **Fidelity and Deposit Co. v. New York City Housing Authority,** 241 F. 2d 142; **United States vs. Bess,** 357 U. S. 51.

It is respectfully submitted that the United States Court of Appeals for the Fourth Circuit, in its opinion, correctly stated the property law of the State of North Carolina (Appendix A, Petitioner's Brief, pp. 26, 29-32) and that the same is a clear and concise statement of said property law. The highlights may be summarized as follows:

1. It is the primary obligation of the owners to pay the subcontractors after the notice of the claim. **Hildebrand v. Vanderbilt,** 147 N. C. 639, 61 S. E. 620; **Charlotte Pipe & Foundry Co. v. Southern Aluminum Co.,** 172 N. C. 704, 90 S. E. 923; **Guilford Lumber Mfg. Co. v. Holloday,** 178 N. C. 417, 100 S. E. 597; **Campbell v. Hall,** 187 N. C. 464, 121 S. E. 761; **Schnepp v. Richardson, 222** N. C. 228, 22 S. E. 2d 555.

2. The subcontractors may maintain an action against the owner, at any time within the period of general limitation, to compel payment of the obligation. **Hildebrand v. Vanderbilt, Supra.; Charlotte Pipe & Foundry Co. v. Southern Aluminum Co. Supra.; Campbell v. Hall, Supra.; Schnepp v. Richardson, Supra.**

3. The liability of the owner to the subcontractor is primary, his obligation to the contractor is secondary; this is true regardless of

the status of accounts between subcontractor and contractor. **Brick Co. v. Pully,** 168 N. C. 371, 84 S. E. 513, **Schnepp v. Richardson, Supra.**

It is, therefore, clear that at the time that the Federal Tax lien was filed, the contractor's only interest in any monies due from McArthur & Chambers was secondary to that of the subcontractors. The tax lien attached to the property and rights to property belonging to the taxpayer but not on property rights of others. **United States v. Bess, Supra.**

This case is not inconsistent with the cases of **United States v. Colotta,** 350 U. S. 808, summarily reversing 79 So. 2d 474 (Miss.); **United States v. White Bear Brewing Co.,** 350 U. S. 1010, summarily reversing 227 F. 2d 359 (C. A. 7th); **United States v. Vorreiter,** 355 U. S. 15, summarily reversing 134 Colo. 543., for the reason that these were cases involving priority of liens. The instant case does not involve priority of liens but involves whether or not the filing of a tax lien in favor of the United State imposes a lien on the property and rights to property of the defaulting taxpayer or whether, as in argued by the United States in this case, legal interests superior to the interests of the defaulting taxpayer shall be swept aside by the mere filing of the Federal Tax Lien, thereby in effect, creating in the United States legal interests superior to those held by the defaulting taxpayer.

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It is respectfully submitted that the tax liens on the property of the defaulting taxpayer do not and should not extinguish private rights and liabilities as between other persons who do not claim by or through or in place of the defaulting taxpayer.

CONCLUSION

The decisions of the District Court and the Court of Appeals for the Fourth Circuit are good law, and since this case is not in conflict with other decisions of this Court, the Writ of Certiorari should be denied.

Respectfully Submitted,

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APPENDIX A.

General Statutes of North Carolina (Recompiled 1950):

SEC. 44-12. Contractor failing to furnish statement, or not applying owners payments to laborers claims, misdemeanor. If any contractor or architect shall fail to furnish to the owner an itemized statement of the sums due to every one of the laborers, merchanics or artisans employed by him, or the amount due for materials, before receiving any part of the contract price, he shall be guilty of a misdemeanor. If any contractor shall fail to apply the contract price paid him by the owner or his agent to the payment of bills for labor and material, he shall be guilty of a misdemeanor and upon conviction thereof shall be fined or imprisioned or both, at the discretion of the court.

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